WHY FREE SPEECH CASES ARE AS HARD (AND AS EASY) AS THEY ARE

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I. INTRODUCTION

Some cases are hard,[1] others easy.[2] A moment's thought confirms that free speech cases follow this familiar pattern. But it is sensible and important to ask why any given free speech case is as hard, or as easy, as it is.[3] The same question might be asked about any particular kind of free speech case, as well as about free speech cases in general. The answers to these questions are not themselves easy.

Why, for example, are interesting free speech cases not thought of as beyond any rational, principled resolution because of their sheer difficulty? Why are some free speech cases hard, and others easy, and not all roughly equally difficult?[4] Finally, why, given all our efforts and accumulated experiences, are most free speech cases not uncontroversially easy?

Answering these questions will take the form of providing an unusual perspective on what is really at stake in free speech cases. Ordinarily, free speech cases involve some sort of conflict between free speech values[5] on one

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1. For discussion, see, e.g., Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961 (1998); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

2. For discussion, see, e.g., James W. Nickel, *Uneasiness About* Easy Cases, 58 S. CAL. L. REV. 477 (1985); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

3. It is certainly possible to conclude that most, if not all, free speech cases, perhaps like other legal cases, can only be said to be decided arbitrarily. If there is no important sense in which any outcome of, or any method or approach to, free speech cases is better than another, then it is foolish to think of a free speech case as hard or easy. Any such claim would be at best misguided and at worst pernicious. This general jurisprudential claim cannot be refuted. For a well-known discussion, see RONALD DWORKIN, LAW'S EMPIRE (1986). As for deep skepticism about free speech case methodology in particular, no specific response and no general response shorter than this Article in its entirety is offered.

4. By way of loose analogy, if someone asks why mathematical problems are of a certain degree of difficulty, ranging from apparently insolvable or presently unsolved but solvable problems to the easiest problems, mathematicians are not expected to reply that all such judgments are arbitrary or that ease and difficulty are purely conventional. No doubt, there is some sense in which ease and difficulty in mathematics and free speech law are indeed relative to a conceptual scheme or "language." But the concerns collectively brought to free speech law (for example, our conceptual scheme) are in turn not entirely arbitrary.

5. For a concise, classic introduction to some basic free speech values, see Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

side, and some sort of governmental, public, social, or even individual interests on the other side. When state government regulations are involved, the typical opposition to free speech values is thought to be the broad reserved state police power interest[6] in protecting the public health, safety, and welfare.[7] When federal regulations are involved, similar thought is given to the broad range of powers constitutionally delegated to the federal government.[8]

However, free speech cases should not be thought of as ultimately involving a conflict, of any sort, between public or other interests on the one side and free speech values on the other. By focusing on any sort of clash of this kind, free speech cases are misunderstood and what really makes free speech cases as hard, or as easy, as they are in any given case is missed.

Instead, to state the thesis dramatically, any and all free speech cases really amount to a battle between standard recognized free speech values[9] on both sides of the case because the various public or other interests in favor of restricting speech may, paradoxically, be re-characterized, re-described, or translated accurately into one or more of the standard free speech values themselves. On a deeper level, standard free speech values are always the only values on each side of any free speech case.

This is not to say that the same sorts of free speech values must appear on both sides of any free speech case. It is certainly not arguable that the same free speech values must appear on both sides of the case in the same strengths. That would make every free speech case a logical or judicial tie. Instead, free speech cases by their essence always involve a conflict of either the same or different free speech values in the same or different magnitudes.

At this introductory point, the nature of the free speech values, the various sorts of typical public or other interests, or the translatability without residue of the latter into free speech values have not been discussed at length. But once these ideas begin to take hold, at least an intuitive sense can be gained of why free speech cases are as hard, and as easy, as they are.

There is no doubt that all sorts of complications could be raised even at this initial stage of the argument.[10] Instead, the argument is first developed in

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For more elaborate discussion, see *infra* Part II.

6. *See* U.S. CONST. amend. X.

7. See, e.g., the state and local interests recognized in dormant commerce clause cases such as *Maine v. Taylor*, 477 U.S. 131 (1986); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

8. See, ultimately, the range of congressional powers under Article I of the United States Constitution along with Article II presidential powers. For a broader perspective on governmental interests, aims, and purposes under modern conditions, see *infra* section III. For an illustrative sampling of both state and federal interests potentially assertable against free speech values, see *infra* section IV.

9. For a reference, see generally Emerson, *supra* note 5.

10. The argument can be made that if there are, in the end, free speech values on both sides of any free speech case, then free speech values themselves are too broad and inclusive

an organized way on the theory that the best response to objections is often a sufficiently careful exposition of the argument itself.

II. THE SCOPE AND MEANING OF THE STANDARD FREE SPEECH VALUES

There are, despite inevitable disputes and imprecision, some standard and widely recognized free speech values upon which much of the free speech literature, and even the classic free speech case law itself, ultimately rely. The term "free speech value" refers simply to one or more of the basic purposes, aims, or goals thought to be pursued by our constitutional protection of freedom of speech itself.[11] Free speech case law is thus assumed to be purpose-driven, at least in a broad sense.[12]

While there is no entirely uncontroversial list of the widely recognized basic free speech values, three such free speech values shall be the focus of this analysis. First, there is the value of the pursuit of truth, or the possibility of truth, in various areas of social life.[13] Second, there is the value of a stable,

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or the idea of free speech values or their usefulness in adjudicating free speech cases is impeached. This argument, though, seems to be a dramatic overreaction. Free speech values inescapably undergird any deep and useful understanding of the institution of freedom of speech and are the touchstone for intelligent choice among free speech tests, categories, and case outcomes.

No position is taken on the claim that, ultimately, free speech values will be found to underlie any legitimately asserted governmental or other interest in every kind of constitutional, or perhaps even every kind of legal, case. This interesting, albeit for our purposes distracting, issue can be left for another day. Arguably, if literally all legitimate governmental interests in our constitutional democracy can be re-described as free speech values, then the category of free speech values is simply too broad. Nevertheless, this claim is, as we shall see, not convincing given the natural, logical development of the recognized standards of aims, values, and purposes underlying our protection of freedom of speech. See *infra* section II.

Nor, for similar reasons, would this logic be impeached if, hypothetically, free speech values were found to underlie a claimant's case in other kinds of individual rights cases, such as substantive due process cases based on privacy or autonomy concerns. Given the predictable overlap between some recognized free speech values and privacy and autonomy interests, anything different would hardly be expected. Again, this does not show that the category of free speech values, or some particular free speech value, has become too broad.

Finally, no position is taken on whether or to what extent to resolve free speech cases by any sort of balancing test. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943 (1987).

11. For a good general discussion, see, e.g., Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

12. This statement is certainly not to suggest that free speech has only instrumental or consequential value, and not intrinsic, expressive, or symbolic value as well. *See generally id.* at 125.

13. *See, e.g.*, *id.* at 130-33; *see also* JOHN STUART MILL, ON LIBERTY 76-77 (Gertrude Himmelfarb ed., Penguin 1984) (1859) (representing a classical approach); William P. Marshall,

progressive, uncorrupt, and responsive democratic government and administration.[14] And third, there is the vital contribution of free speech to self-realization,[15] personal and cultural development, autonomy, and autonomous decision-making.[16] These three free speech values are at least

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In Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1 (1995); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1986).

14. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 2 (1996) ("Although some view the First Amendment as a protection of the individual interest in self-expression, a far more plausible theory . . . views the First Amendment as a protection of popular sovereignty."). Professor Fiss characterizes his view as a democratic as distinct from a libertarian theory of free speech. *See id.* at 3. Alternatively, he emphasizes a theory of collective self-determination as distinguished from self-actualization. *See id.*; *see also, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 547; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

15. *See, e.g.*, C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982) (critiquing Redish, *infra*); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679 (1982) (emphasizing that self-realization may be as crucially promoted by listening to or receiving speech as by the act of expressing or delivering speech) [hereinafter Redish, *Self-Realization*]; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (individual self-realization as referring either to the full development of a person's powers or potential or to "the individual's control of his or her own destiny through making life-affecting decisions") [hereinafter Redish, *Free Speech*]; John T. Valauri, *Smoking and Self-Realization: A Reply to Professor Redish*, 24 N. KY. L. REV. 585, 586 (1997) (critiquing Redish's approach, but recognizing the breadth of the free speech self-realization value).

None of this, of course, is to suggest that all dimensions of self-realization are in every respect dependent upon freedom of speech. *See, e.g.*, Smith, *supra* note 13, at 676. A case could be made for the special and successful self-realization of at least a very few victims of political persecution or perhaps of a few religious mystics for whom freedom of speech in the classic sense was either unavailable or largely irrelevant.

However, the absolutely indispensable linkage of free speech and self-realization is discussed in MILL, *supra* note 13, at 95 ("Not that it is . . . chiefly . . . to form great thinkers that freedom of thinking is required. On the contrary, it is as much and even more indispensable to enable average human beings to attain the mental stature which they are capable of."); *id.* at 97 ("[T]he intellect and judgment of mankind ought to be cultivated . . . ."); *id.* at 1321 (following von Humboldt, seeking to promote "the highest and most harmonious development of [the person's] powers to a complete and consistent whole"); *id.* at 123 (growth and development of human nature as requiring the active deployment of all of one's faculties and powers).

16. *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 879 (1994) (distinguishing between and among descriptive and ascriptive autonomy or the actual degree of "internal" self-government as distinct from the dignitary grounds of our moral right to independent decision-making and action and the separate dimension of libertarian as opposed to "positive" conceptions of both of the above forms of autonomy); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445,

reasonably and widely acknowledged. The simple addition of other free speech values would make the main arguments even easier to establish.

These three basic free speech values can be best clarified by noting their generally accepted breadth and expansive scope. The truth value, for example, in itself relies upon no particularly controversial claim as to the status, objective or otherwise, of any sort of truth.[17] This presumably includes truths, half-truths, gross errors, and vividly and emptily held truths of many sorts;[18] in politics, culture and entertainment,[19] as well as science;[20] and in preparatory as well as public or final forms of expression.[21]

446-47 (1983) (referring to "autonomy" as a self-government capacity, actual such self-government, an associated ideal of character, or something analogous to "sovereignty" at the international level); Thomas E. Hill, Jr., *Autonomy and Agency*, 40 WM. & MARY L. REV. 847, 848-49 (1999) (discussing Feinberg on "autonomous agents" as entitled to make decisions without undue external interference); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171 (1993) (critiquing Post, *supra*); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 159 (1997) (describing autonomy as (the capacity for) rational self-deliberation); *id.* at 166 (emphasizing, in a way deeply supportive of our basic thesis, that "[a]ccording to Kant, the ultimate justification of the State is to protect the autonomy of its citizens"). More broadly, the idea of autonomy has been central to works such as JOSEPH RAZ, THE MORALITY OF FREEDOM (1988), *discussed in* Jeremy Waldron, *Autonomy and Perfectionism in Raz's* Morality of Freedom, 62 S. CAL. L. REV. 1097 (1989), and has been pursued in broader constitutional and moral contexts in Lawrence C. Becker, *Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality*, 40 WM. & MARY L. REV. 959, 959 n.1 (1999) (relying upon Professor Gerald Dworkin's understanding of autonomy as a "second-order capacity" for critical reflection and change, in such a way as to define, give meaning and coherence to, and to take responsibility for one's own life) (citing GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (1988)); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 30 (1995) (quoting Gerald Dworkin's broad and multi-dimensional understanding of the idea of autonomy itself, DWORKIN, *supra*, at 6); *see also* LAWRENCE HAWORTH, AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS (1986).

17. *See, e.g.*, Marshall, *supra* note 13.

18. *See, e.g.*, MILL, *supra* note 13, at 76-77.

19. See, e.g., the Supreme Court's mildly awkward clothing of commercial barroom nude dancing with some degree of free speech protection in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

20. See, e.g., the particular saving grace of serious scientific value provided for in the classic obscenity test endorsed in *Miller v. California*, 413 U.S. 15, 24 (1973).

21. It would ill-behoove the government to attempt to defend a seizure of an early draft, a work in progress, mere notes and scraps, or even to interfere with thought processes themselves on the grounds that such items and processes are really prior to, and not within the scope of, speech itself. Preventing someone from arriving at or formulating certain thoughts is not compatible with free speech; it is at the heart of the Brave New World anti-free speech distopia. *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1946).

Free speech as contributing to modern democratic, responsive, participatory government and administration is equally multi-dimensional in its implications. This "democratic" free speech value may have important implications for the distribution of political, economic, and educational resources,[22] for campaign funding,[23] and for regulating television or other media potentially influencing the democratic process of political choice.[24] The democratic value underlying freedom of speech has been linked to reducing political corruption in a broad sense,[25] to encouraging both stable political development and significant political change,[26] and to promoting the important civic virtue of tolerance.[27]

The democratic free speech value, like the truth value, thus affects politics, government, and administration pervasively in important ways. But this is also true of the third basic free speech value, which may be referred to, at the price of oversimplification, as that of self-realization.

The term "self-realization" is merely used here as shorthand for, and without intent to discount, any of the legitimate and proper breadth associated with this free speech value.[28] Self-realization as a free speech value may refer to decisions, habits, or ways of being, ranging from the spontaneous and impulsive to the carefully calculated. Self-realization may range from mere gratification, or the physical protection of self or others, to the fullest development of the highest human capacities in the most harmonious fashion.[29] There is also a separate sense of the self-realization free speech value as something like captaining one's own fate or destiny through the agency of one's own decisions.[30] Self-realization may incorporate an element of responsiveness to others as well.[31]

The self-realization value is also sometimes expressed in terms of autonomy, an idea that is also quite broad and multi-vocal. Certainly,

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22. *See, e.g.*, FISS, *supra* note 14; *see also* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999).

23. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); J. Skelley Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

24. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (upholding a purportedly viewpoint-neutral exclusion of a candidate from a televised debate in a nonpublic forum). More broadly, see Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000).

25. *See generally* Blasi, *supra* note 14.

26. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970).

27. *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

28. For a highly selective and almost randomly chosen introduction to some of the literature, see *supra* notes 15-16.

29. For discussion of this highest level of self-realization, see MILL, *supra* note 13, at 121-23.

30. *See, e.g.*, Redish, *Free Speech*, *supra* note 15, at 593.

31. *See, e.g.*, Redish, *Self-Realization*, *supra* note 15, at 679.

autonomy as a free speech value is not confined to a narrow, technical Kantian sense in which a maxim passes some sort of universal rational willing test.[32] Autonomy, as a commonly used free speech value, has an "internal" and an "external" component.[33] That is, there may be both internal and external socially imposed limits on one's autonomy. This line between internal and external limits may not be easy to draw; cultural influences may be external, but they may undercut one's autonomy through distorting one's own basic preferences and the internal formation of those preferences.

Autonomy as a basic free speech value is often linked to the very capacity for rational deliberation by a person.[34] Autonomy is also directly linked to the capacity for self-government,[35] to the ideal of character, to the principles of sovereignty and independence in thought or action,[36] and even to the idea of personal responsibility itself.[37]

Kant's rather narrow, technical view of autonomy is of special importance for this thesis because in Kant's view autonomy is not only clearly recognizable as a free speech value for the sake of legally protected speech, but is also and at the same time nothing less than "the ultimate justification of the State."[38] To simply assume Kant to be right in this, it would seem undeniable that the basic free speech value of autonomy would turn up, at a deep level, as the crucial consideration on both sides of the typical contested free speech case. Autonomy would be at the heart of both free speech and of government regulatory interests generally. Of course, both the range of free speech values and of government interests in free speech cases are likely to expand beyond a narrow, technical sense of autonomy. However, Kant is clearly helpful in suggesting that in at least many free speech cases, roughly the same kind of free speech value, that of autonomy, may actually be crucial to both sides of the case.

III. WHAT COUNTS AS A GOVERNMENT INTEREST IN A MODERN CONSTITUTIONAL DEMOCRACY?

For the moment, the questions of what counts as a free speech value and what kinds of government or public interests might be set on the opposite side of a free speech case should be set aside. Those issues will be pursued further

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32. For recent general discussion, see CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS (1996); ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY (1989); ALLEN W. WOOD, KANT'S ETHICAL THOUGHT (1999).

33. *See, e.g.*, Fallon, *supra* note 16, at 879.

34. *See, e.g.*, Wells, *supra* note 16, at 159.

35. *See, e.g.*, Feinberg, *supra* note 16, at 446.

36. *See, e.g.*, Hill, *supra* note 16, at 847.

37. *See, e.g.*, Becker, *supra* note 16, at 951 n.1 (relying on DWORKIN, *supra* note 16, at 20).

38. *See* Wells, *supra* note 16, at 166.

below. For the moment the focus should not be restricted to merely free speech or to the sorts of public interests that might conflict with free speech values in particular. Instead, a brief and highly selective survey of some of the more general governmental purposes thought to underlie modern democratic government in general should provide, at the least, some perspective on, and perhaps indirectly illuminate, concerns regarding the real nature of free speech cases.

This survey of modern democratic aims will deliberately downplay certain forms of such values, virtually excluding any that focus directly on emancipation and liberation and that therefore might link too easily to the basic values underlying free speech. Instead, for the sake of credibility, the focus will be mainly on some influential English political writers, from the 19th to the early- and mid-20th century, to provide guidance as to the crucial aims and elements of a modern, broadly democratic government.[39]

Some of the 19th century English expositions of the purposes of government are, as expected, starkly utilitarian. James Mill, for example, refers to the purpose of government as "to make that distribution of the scanty materials of happiness, which would insure the greatest sum of it in the members of the community, taken altogether, preventing every individual . . . from interfering with that distribution."[40] However, as the philosopher Henry Sidgwick later recognized, there also had arisen a widespread belief that freedom itself, as distinct from utility maximization, should be considered "the ultimate end of political order."[41]

Freedom was, in some of the leading early 20th century formulations, as presented earlier by James Mill,[42] combined with an explicit concern for some forms of equality and for corresponding forms of justice.[43] The political theorist William E.H. Lecky referred to the government aim most crucial to happiness as that of "securing equal justice,"[44] and Leonard Hobhouse later referred to self-government as requiring "a measure of personal freedom and of equal consideration for all classes."[45]

Robert M. MacIver presented a somewhat more comprehensive view of the aims and purposes of the state, arguing first for order, but order for the sake of protection, and ultimately for the sake of social conservation and

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39. This is hardly to suggest that the British usage of "constitutional" government, with its rigorous exposition of discrete writings, parallels our own.

40. JAMES MILL, ESSAYS ON GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS, AND LAW OF NATIONS 4 (photo. reprint 1986) (1825).

41. HENRY SIDGWICK, THE METHODS OF ETHICS 297 (5th ed. 1983). In this respect, John Stuart Mill was arguably closer to the position here referred to by Sidgwick than to that of his father. MILL, *supra* note 40.

42. *See* MILL, *supra* note 40, at 4.

43. *See generally* R.H. Tawney, EQUALITY (4th rev. ed. 1965)

44. 1 WILLIAM EDWARD HARTPOLE LECKY, DEMOCRACY AND LIBERTY 77 (new ed. 1903).

45. LEONARD T. HOBHOUSE, DEMOCRACY AND REACTION 188 (2d ed. 1909). At greater length, see the classic R. H. TAWNEY, EQUALITY (1964).

development, including cultural development and education.[46] A bit more abstractly, Thomas Hill Green argued that the general institutions of civil life "render it possible for a man to be freely determined by the idea of a possible satisfaction of himself, instead of being driven . . . by external forces, . . . and they enable him to realize his reason, [that is], his idea of self-perfection."[47] His rationale comes close to a view of public institutions as promoting both internal and external autonomy.

While MacIver's and Green's formulations differ greatly in focus and specificity, they both clearly link the crucial purposes and aims of government generally with crucial free speech values, in particular with some form of free and reasonable self-development and self-realization. Here again, basic government purposes and free speech values do not, at some basic level, so much conflict as correspond.

Thus, both a constitutional democratic government and the regime of free speech focus purposely on freedom itself as a crucial general value. As A. D. Lindsay stated, the goal of "the state's compulsion is to give room for liberty—but not just for the independent liberty of individuals but for the kind of freedom and liberty which are possible only in social life."[48] Harold J. Laski argued to similar effect that "[t]he State . . . is built to defend the civic minimum of rights without which . . . no man can hope to be his best self."[49] Again, governmental purposes and free speech values are, ultimately, deeply inseparable.

In the context of the Second World War, the sense of priorities among governmental roles was, at least temporarily, modified. Sir Ernest Barker, for example, sensibly emphasized that "[d]emocracy must enlist the thought of the whole community in a process of discussion; but it must also produce a government capable of conducting the affairs of war and peace."[50] However, this sort of emphasis actually is attuned perfectly to promoting the free speech values. After all, the point of free speech protection is not merely for government to honor free speech values in a disembodied, ineffectual way, but to protect, defend, preserve, and promote them in practice.[51]

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46. *See* R. M. MACIVER, THE MODERN STATE 7, 188, 189 (1964); *id.* at 190-91 (presenting a compact chart of the functions of the State).

47. THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 32-33 (1927).

48. A. D. LINDSAY, THE ESSENTIALS OF DEMOCRACY 77 (1929).

49. HAROLD J. LASKI, A GRAMMAR OF POLITICS 28 (2d ed. 1931). Of course, Laski would have had no overwhelming objection to state intervention for public purposes into appropriate markets. *See also* BERNARD BOSANQUET, THE PHILOSOPHICAL THEORY OF THE STATE 216 (MacMillan 4th ed. 1923) (photo. reprint 1930) (referring to "the aim of the State in maintaining the system of rights instrumental to the fullest life"). Note the obvious linkage between those self-realizational-oriented rights and the free speech values, including self-realization.

50. ERNEST BARKER, REFLECTIONS ON GOVERNMENT 412 (1942).

51. Part of what is most inspiring about President Franklin Delano Roosevelt's "Four Freedoms" speech is its powerfully persuasive evocation of classic free speech values in the

On these views, state protection of liberty, happiness, and community are largely inseparable. The democratic theorist A. D. Lindsay, following the philosopher Bernard Bosanquet,[52] urged that "the purpose of the rules [the state] enforces is to set free spontaneity and liberty"[53] and that "[t]he function of the state . . . is to serve the community and in that service to make it more of a community."[54] While the more Hegelian F. H. Bradley argued that it is obedience to the state that "bestows individual life and satisfaction and happiness,"[55] along with individual realization,[56] even this sentiment can be given a libertarian turn.[57]

Of course, some formulations of the basic purposes of governments may well vary. Professor Carl Friedrich's analysis focuses on such matters as security, territorial expansion, reduction of internal and external friction, and prosperity.[58] But even Professor Friedrich himself did not see these state aims in conflict with "basic values such as justice, freedom, and so on."[59]

Finally, and most recently, Professor Jack Lively has characterized the democratic form of government in particular as allegedly promoting political equality, the general interest, individual liberty, participatory self-

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context of not only the ongoing threat of the Great Depression, but of the impending or ongoing World War II. The speech remains one of the most powerful evocations of the democratic free speech value, and even more deeply of the free speech value of self-realization at even its most elemental levels. *See generally* President Franklin Delano Roosevelt, "Four Freedoms" Speech to Congress (January 6, 1941).

52. *See* BOSANQUET, *supra* note 49.

53. 1 A. D. LINDSAY, THE MODERN DEMOCRATIC STATE 245 (1943). Of course, there is a difference between liberty in general and free speech in particular, but the purposes or values underlying freedom of speech are broad enough to account for the governmental interest in liberty more generally.

54. *Id.*

55. F. H. BRADLEY, *My Station and Its Duties, in* ETHICAL STUDIES 98, 120 (Oxford Univ. Press 1951) (1927).

56. *Id.*

57. After all, if individual self-realization did not follow, this would signal a breakdown, at some point, in Bradley's theory. *See* ERNEST BARKER, PRINCIPLES OF SOCIAL AND POLITICAL THEORY 47 (1951). Sir Ernest writes that "the State and its law exist for the sake of the general good life . . . [but] all they can do . . . is to secure . . . the uniform doing of external acts, and to erect thereby an external framework for the inward movement of a good life which proceeds by its own proper motion." *Id.* Presumably, these ultimate state interests can be identified with familiar free speech values such as democratic self-rule, autonomy, and self-realization.

58. CARL JOACHIM FRIEDRICH, MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS 59 (1963).

59. *Id.* at 60; *cf.* ARNOLD BRECHT, POLITICAL THEORY 245 (1959) (critically discussing the political scientist Charles Merriam's focus on governmental purposes as encompassing "external security, internal order, justice, general welfare and freedom") (quoting CHARLES E. MERRIAM, SYSTEMATIC POLITICS 31 (1945)). These basic aims, presumably, could readily be translated into free speech values.

government,[60] and "a particular and desirable cast of characters."[61] Each of these basic governmental goals could be translated, re-characterized, or redescribed without gross distortion into some function of one or more of the standard free speech values.

IV. WHAT'S ON THE "OTHER" SIDE OF FREE SPEECH CASES IN PARTICULAR?

A. Some Hypothetical and Rhetorical Cases

To this point, the most frequently asserted free speech values or purposes have been briefly introduced[62] and have minimally expounded the basic aims of democratic constitutional government in general in the modern era.[63] Now, it would be useful to revisit the more specific sorts of interests, state or federal, public or largely private, that might be counterposed to the free speech values promoted by unregulated speech in any given free speech case.

This analysis will begin with a familiar example or two, add a legal scholar's summary of some common speech regulative interests, and finally present a selective inventory of such fairly specific public interests drawn from a number of well-known cases. From that point, further analytical progress should be possible.

Perhaps the instance of a public interest, as opposed to a speaker's right to free speech, which most nearly approaches icon status would be the interest in avoiding a panic sparked by the unwarranted shouting of "fire" in a crowded theater.[64] However, prevention of unnecessary panic is not the only uncontroversial interest that might be arrayed against free speech. Professor William Van Alstyne cites, for example, instances of an offer

> to pay five thousand dollars for the murder of the offeror's spouse; a congressman's bribe solicitation; an interstate manufacturer's false and misleading commercial advertisements; a witness committing perjury in the course of a trial; or a member of the public interrupting (by speaking) someone else already speaking at a city council meeting.[65]

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60. JACK LIVELY, DEMOCRACY 111 (1975).

61. *Id.* By a desirable democratic cast of characters, Professor Lively may perhaps be referring to the gradual demise of the vaguely servile, "deferential" politics described, among other places, in WALTER BAGEHOT, THE ENGLISH CONSTITUTION (London, Kegan, Paul 2d ed. 1909).

62. *See supra* Part II.

63. *See supra* Part III.

64. This example is inspired by Justice Holmes' hypothetical in *Schenck v. United States*, 249 U.S. 47, 52 (1919).

65. WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 24-25 (1984).

It is not difficult to imagine some of the public interests arrayed against the speech in question in these cases. An oral solicitation of murder tends to promote the commission of murder. A bribe solicitation threatens the corruption of democratic politics. False and misleading advertising may threaten actual harm, and in other cases a disappointing return on one's otherwise free choice of consumption goods. Perjury during a trial may result in injustice through the burdening of an undeserving victim, obscuring the judicial truth, impairing the reputation of the judicial system as an engine for the discovery of truth,[66] and impairing the administration of democratic justice. Finally, interrupting a speaker, through one's own speech, plainly tends to impair the ability of the first speaker to convey a message.

In each of these cases, there are one or more countervailing interests, of whatever weight, opposable to those interests of the speaker. There are, perhaps, even some recurring historical themes underlying the interests typically opposing those of speakers. Harry Kalven, Jr. argued that among such motivations were "religion; patriotism in time of war; removing government policies and officials from aggressive, unfair criticism; elevating public taste; and avoiding stimuli to disruptive political action."[67]

Now, at least some of the conflicts posed by Professor Van Alstyne's hypothetical cases listed above are genuine and inescapable. Any cases based on the above hypotheticals would differ in their degree of legal difficulty or controversiality. On the other hand, it should be recognized that in each of Van Alstyne's hypothetical cases the major public interests arrayed against the speech are themselves translatable into or reducible to one or more of the familiar free speech values.[68]

If this fact is typically overlooked, it may be due as much to obviousness as to subtlety. Murder, for example, is the quintessential case of the suppression of the victim's achieved and potential self-realization, in every sense in which free speech theorists have used the term.[69] There are, of course, many different reasons to prohibit murder, but there are also many crucial ways in which murder is opposed to the victim's and other persons' self-realization.

Doubtless it seems odd to oppose murder and self-realization; however, this oddity shows not that there is a mismatch or misconception at work, but that the opposition between the two is patent and complete. Nor is the opposition between murder and self-realization merely a coincidence. Murder, as seriously wrong, naturally undermines self-realization in serious

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66. Compare Wigmore's view that cross-examination amounts to "the greatest legal engine ever invented for the discovery of truth." *See* 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn rev. ed. 1974).

67. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 6 (Jamie Kalven ed., 1988).

68. For preliminary discussion, see *supra* section II.

69. *See supra* notes 15-16 and accompanying text.

ways. In a modern constitutional democratic state, the seriousness of murder can be ordinarily gauged by the seriousness of its effect on self-realization. The effects of a murder on self-realization may well amount to an admittedly rather abstract catalogue of murder's legally cognizable harms.

If it is argued that some murders—for example, multiple murders, or a murder that orphans several young children—are particularly objectionable, then controversy may arise. Nevertheless, it is certainly possible to argue that such murderers are particularly reprehensible because of the severe effects of such murders on the self-realization, or the capacity for future self-realization, of the direct and indirect victims in such cases.

Although initially paradoxical, the basic public interests against solicitation of murder are actually translatable into one or more free speech values, in this case mainly that of self-realization. It hardly goes too far, in a modern democratic constitutional state, to say that how such murders oppose the legal public interest can be expressed accurately, if unfamiliarly, in terms of self-realization.

Of course, there may be a sense in which free speech value terms, including all variations on self-realization, cannot fully capture the public interests opposed to murder. But this is true of any broad attempt to fully articulate how murder may harm, in ineffable ways, the public and its interests. In the case of murder and some other serious crimes, it is arguable that part of what is really wrong cannot be represented in terms of any violated interest, whether public, social, or private. Perhaps the wrongness, if not the harm, of murder, may not be expressable simply in terms of interests alone.[70]

But even in the case of murder, theorists and even prosecutors may wish to do more than say that the criminal defendant should be convicted for reasons that are utterly inarticulable and that transcend human interests. Hopefully, in typical free speech cases, the crucial interests arrayed against the speaker will also not transcend the category of "interests" entirely.

There is one final, related clarification to be offered. It is argued that in free speech cases, there turn out to be, at the essence of the case, free speech values on both sides. Therefore, every free speech case can be expressed in terms of one set of free speech values pitted against another. This essential contest between free speech values[71] does not mean that there are only literal, explicit free speech arguments on both sides of the case. It can be argued sensibly that the extreme harm of murder can be articulated in free speech

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70. Theorists differ, for example, in their approach to crimes like murder. Those particularly influenced by some form of utilitarian or, more broadly, consequentialist approaches to murder may be more comfortable with the idea of murder as opposing the public interest in one or several ways, whereas deontologists may regard such analysis as incomplete, even if meaningful. For some discussion of this basic distinction in approaches, see, e.g., Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 252-53 (1996).

71. *See supra* Part II.

value terms—particularly that of self-realization—as well as in other legally cognizable terms. What is not claimed, of course, is that the harm of murder should be thought of as a harm to the victim's freedom of speech.

The values underlying free speech are obviously broader than free speech itself. No doubt, being murdered means that one can neither speak nor exercise any constitutional freedom of speech. For some murder victims, the effect of being silenced would be of some importance. But the effects of death on one's speech, or one's speech rights, are typically of no great consequence to the murder victim and no part of this analysis.

From this point, the remainder of Professor Van Alstyne's examples[72] are taken at a brisker pace. The basic lessons will be the same. There is a free speech interest, of some minimal weight, in soliciting or offering a congressional bribe. On the other side of the case—and arguably the essence of the other side of the case—are one or more free speech values, largely the democratic-government-and-administration value,[73] including the free speech value of "checking"[74] political and governmental corruption.

False and misleading commercial advertising,[75] on the other hand, can implicate the free speech values of the pursuit of truth[76] and of self-realization.[77] Perjury[78] could, in a different way, be said to impeach the free speech value of truth[79] as well as the administration of democratic government.[80] Further, it could hardly be said that these free speech values are just incidental to the case for punishing the speaker. They fairly characterize the major public and other interests in restricting the kind of speech at issue.

Van Alstyne's final hypothetical example refers to orally interrupting a speaker (who is presumably justly entitled to the floor) at a public meeting.[81] This is a relatively easy case for the main thesis. While the interrupter may cite free speech interests of whatever nature and weight, it is at the core of the case for not allowing the interruption that the initial, authorized speaker can cite standard free speech interests in favor of the restriction. Of course, there is a fundamental coordinating free speech interest in not self-defeatingly all

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72. *See supra* note 65 and accompanying text.

73. *See supra* note 14 and accompanying text.

74. *See id.*

75. *See supra* note 65 and accompanying text.

76. *See supra* note 13 and accompanying text.

77. *See supra* notes 15-16 and accompanying text. For some skepticism as to the nature of the linkage between contemporary commercial advertising and the basic free speech values as traditionally conceived, see RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996); R. GEORGE WRIGHT, SELLING WORDS (1997).

78. *See supra* note 65 and accompanying text.

79. *See supra* note 13 and accompanying text.

80. *See supra* note 14 and accompanying text.

81. *See supra* note 65 and accompanying text.

talking at once.[82] There are also the free speech values of the pursuit of truth,[83] of democratic self-government,[84] and even of self-realization[85] and autonomy.[86] This is again not to prejudge the outcome of this or any other free speech case, but to show that one or more free speech values are at the core of both sides of the case.

B. Some Real Judicial Cases

There are obvious real-world examples of this bilateral conflict of free speech values. Consider a magazine publisher and a private figure libel plaintiff, as in the well-known case of *Gertz v. Welch*.[87] Elmer Gertz, a Chicago attorney, had attracted the notice of the defendant publisher, who accused Gertz of belonging to several loosely Marxist associations or activities.[88]

Gertz's libel action naturally evoked concern for any defendant publisher's free press and free speech rights. More interestingly, and more applicable here, is the notion that Gertz's own interests on the plaintiff's side of the libel case are themselves readily expressed in, or convertible into, free speech value terms. The Court in *Gertz* observed:

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood . . . . [T]he individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being . . . [and t]he protection of private personality . . . ."[89]

It is certainly fair, even if unusual, to express these libel plaintiff interests in terms of self-realization[90] and autonomy[91] free speech value interests. It is not as though the scope or generality of the free speech values are being expanded to allow them to encompass Gertz's interests. This level of generality is

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82. It seems doubtful that a maxim of speaking whenever one likes, whether anyone else has recently been recognized to speak or not, could pass most practical universalization tests. *See, e.g.*, sources cited *supra* note 32.

83. *See supra* note 13 and accompanying text.

84. *See supra* note 14 and accompanying text.

85. *See supra* note 15 and accompanying text.

86. *See supra* note 16 and accompanying text.

87. 418 U.S. 323 (1974).

88. *See id.* at 326-27.

89. *Id.* at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Stewart, J., concurring)).

90. *See supra* note 15 and accompanying text.

91. *See supra* note 16 and accompanying text. As merely one example, dignity and worth of every person can be linked to Kantian-style autonomy without much difficulty. *See, e.g.*, sources cited *supra* note 32.

typical of any discussion of the free speech values.[92]

Are either the Van Alstyne hypothetical cases[93] or the *Gertz* case[94] somehow untypical of free speech cases more generally? Attention should be turned to a more substantial range of real free speech cases and to one or more of the interests opposed to the explicit free speech interests, most commonly a speaker's interests, on the other side of the case. The reader's patience will not be taxed by translating in each case the interests opposing those of the speaker into standard free speech value terms. Such grounds for rebutting or confirming[95] the main thesis will at least be conveniently available for consideration.

Such a listing of countervailing interests then, in chronological order of the case decision, might include the following: a claimed hindrance to a war effort, along with a claimed conspiracy to obstruct, if not the actual obstruction of, the military recruiting service in wartime, along with the associated harms;[96] the hypothetical counseling of murder and the actual charge of conspiracy to provoke disorder or disloyalty in the military in time of war, with the associated harms;[97] the charged obstruction of the military recruiting service;[98] a charged conspiracy to urge curtailment of wartime production;[99] a claim of advocating the overthrow of organized government;[100] an ultimately insufficient claim of a clear and present menace to the public peace;[101] the adverse effects of "fighting words;"[102] the public interest in aural peace and tranquility;[103] the effects of disciplined conspiracies to overthrow lawful governments;[104] an alleged interference with the educational process or violation of the privacy or security rights of other students;[105] an asserted

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92. It is not argued that Gertz or any other libel plaintiff is really making a free speech claim, or its equivalent, for himself. It is not a matter of Gertz's free speech against Welch's free speech; that would simply distort what is at stake in the case.

93. *See supra* note 65 and accompanying text.

94. *See supra* notes 87-92 and accompanying text.

95. While the following cases are diverse and well-known, admittedly they cannot possibly exhaust the full range of free speech cases. But then, neither has the full range of cows yet to be examined to confirm our inductive inference that none are purple.

96. *See* Schenck v. United States, 249 U.S. 47 (1919).

97. *See* Frohwerk v. United States, 249 U.S. 204 (1919).

98. *See* Debs v. United States, 249 U.S. 211 (1919).

99. *See* Abrams v. United States, 250 U.S. 616 (1919).

100. *See* Gitlow v. New York, 268 U.S. 652 (1925). Note that the ability of a state government, as opposed to the federal government, to bring such a claim under its traditionally reserved 10th Amendment general police power or under its health, welfare, and safety interests hardly seems to make much difference from our perspective.

101. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

102. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

103. *See* Kovacs v. Cooper, 336 U.S. 77 (1949).

104. *See* Dennis v. United States, 341 U.S. 494 (1951).

105. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

interest in a personal "right of reply" and in greater diversity of broadcast content generally;[106] an interest in avoiding coercive threats or retaliation for engaging in protected labor activity;[107] a hypothetical interest in protecting substantial privacy interests from intolerable invasion;[108] an asserted interest in the confidentiality of military or national security secrets;[109] an assumed interest in reducing press homogeneity and a tendency toward local news and editorial monopolies;[110] asserted interests in avoiding the actuality or appearance of electoral corruption and in expanding realistic electoral speech opportunities;[111] the interest in avoiding false, deceptive, or misleading commercial advertisements;[112] potential conflicts between free press rights and rights to a fair and impartial trial;[113] a distinction between unsuitable educational books and purely personal objection to school library books;[114] the interest in distinguishing between incumbent and non-incumbent teacher unions in a "public forum doctrine" case;[115] the affronts, insults, physical injuries, and sexual attacks assumedly linkable to certain forms of pornography;[116] an asserted public interest in governmental workplace efficiency and morale;[117] the interests of the "object" of picketing as an essentially "captive audience;"[118] the privacy interests of victims of sexual assault;[119] the interests of victims in protection from sub-classes of "fighting words;"[120] the assumed public interests in aesthetics and traffic safety;[121] an assumed public interest in avoiding brewer competition based on increasing alcohol content;[122] the privacy interests of recent personal injury victims as against unsolicited written communications from attorneys;[123] and finally, if almost randomly, the assumed public interest or children's interest in limiting the accessibility of arguably age-inappropriate cable television

106. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
107. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
108. *See* Cohen v. California, 403 U.S. 15 (1971).
109. *See* New York Times Co. v. United States, 403 U.S. 713 (1971).
110. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).
111. *See* Buckley v. Valeo, 424 U.S. 1 (1976).
112. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
113. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
114. *See* Board of Educ. v. Pico, 457 U.S. 853 (1982).
115. *See* Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
116. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
117. *See* Rankin v. McPherson, 483 U.S. 378 (1987).
118. *See* Frisby v. Schultz, 487 U.S. 474 (1988).
119. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989).
120. *See* R. A. V. v. City of St. Paul, 505 U.S. 377 (1992).
121. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).
122. *See* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
123. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

programming.[124]

The strength, or even the reality, of all of these interests is here not being vouched for in judicial opposition to those of regulated speakers. The point instead is that the many and diverse interests cited above are readily translatable, without substantial distortion, into one or more standard free speech values and at the same level of generality at which most typical free speech values are discussed. Each of the above cases represents many others, either at the Supreme Court or some other judicial level.[125]

Of course, even the rather lengthy listing above is unable to encompass all the significant kinds of free speech cases. The kinds of cases considered could be increased.[126] However, this inductive approach inevitably involves tedium on the one hand and inescapable incompleteness, and therefore indecisiveness,[127] on the other. Realistically, the inductive approach seems unimprovable. Let anyone who doubts the main thesis offer counterexamples.

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124. *See* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

125. As merely one example, consider the sheer volume of free speech cases brought as so-called *Pickering-Connick* litigation, represented in our list merely by the case of *Rankin v. McPherson*, 483 U.S. 378 (1987). As merely a few examples of this vast body of free speech litigation, see Board of County Comm'rs v. Umbehr, 518 U.S. 668, 678-81 (1996) (extending *Pickering-Connick* interest balancing test beyond government employee speech to government independent contractor speech); Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Educ., 391 U.S. 563 (1968); Lighton v. University of Utah, 209 F.3d 1213 (10th Cir. 2000); Sexton v. Martin, 210 F.3d 905 (8th Cir. 2000); Latino Officers Ass'n v. City of New York, 196 F.3d 458 (2d Cir. 1999); Morris v. Lindau, 196 F.3d 102 (2d Cir. 1999); Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439 (5th Cir. 1999); Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999), *rev'd*, 216 F.3d 401 (4th Cir. 2000). For general commentary on the sort of interest balancing typically involved in these cases, see, e.g., Clifford P. Hooker, *Balancing Free Expression and Government Interests:* Connick v. Myers, 15 Educ. L. Rep. 633 (1984). The basic point, of course, is that the government interests in *Pickering-Connick* cases can, for our purposes, more usefully be seen to embody one or more of the standard free speech values, presumably focusing on the democratic government and administration value and the so-called "checking" value in particular. *See supra* note 14 and accompanying text.

126. Consider, for example, the asserted logic of the child pornography cases. *New York v. Ferber*, a leading case, recites that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." 458 U.S. 747, 757 (1982) (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)). This language combines the classic John Stuart Mill-type self-realizational free speech value with a standard democratic process free speech value argument. *See supra* notes 14-15 and accompanying text. For recent examples of cyberspace pornography cases, see, e.g., United States v. Matthews, 209 F.3d 338, 342 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999).

127. As noted at *supra* note 95, the possibility of an as yet undiscovered purple cow cannot be rigorously precluded by any inductive methods.

V. COMMENSURABILITY, COMPARABILITY, AND REASONABLE RESOLVABILITY IN FREE SPEECH CASES

A. Introduction

The basic lessons to this point should be restated. Any typical free speech case can be recast and reconceived as involving a conflict between some combination of traditional free speech values on either side of the case. What does this mean, though, for the ease or difficulty of deciding free speech cases? Should free speech cases really be easier, or harder, if not impossible?

Clearly, it can be inferred that free speech cases in general are not as hard—or as rationally impossible—as they might have been if the same or similar free speech values, of whatever weight or intensity, did not typically appear on and jointly exhaust both sides of the case. The interests invoked in free speech cases need not be viewed as counterposing, untranslatable, mutually uncomprehending, unrelated values or interests as though one side of the case were about cooking and the other about geometry.

After all, in the simplest free speech case, similar manifestations of precisely the same, single free speech value would exhaust the considerations on both sides of the case. No such simple case is likely to occur. Basically, this is because there will, in any realistic case, always be more than one single free speech value on both sides of the case however preeminent some particular free speech value in that case may be.

This lack of mutually exclusive arguments is largely a reflection of the sheer practical interrelatedness and similarities among the standard free speech values. The free speech values often tend to appear together. In fact, it is not an exaggeration to say that most of the standard free speech values often appear on both sides of most free speech cases, at least to some minimal degree. There are certainly exceptions to this tendency. Nude barroom dancing, and indeed most narrow commercial speech, will not have much to do with democratic self-government in a narrow sense, but indeed may bear upon democratic self-government in some broader sense.

To test this idea of value multiplicity, consider the relatively simple speech case in which two persons, with similar histories or circumstances, have simultaneously begun talking in a jointly distracting way to a small audience at a civic meeting. The public leader of the meeting has been unable to recognize or otherwise distinctly authorize either speaker to talk or even to set any relevant ground rules in advance. Assuming that the public leader authoritatively presiding over the meeting must now make some recognition decision, thereby restricting speech because speaking first is thought to confer some advantage, then there is a genuine, if relatively simple, free speech case.[128] Can it be said, even in this almost irreducibly simple free speech case,

128. This hypothetical case could, presumably, be addressed as well under the theories and

that there is only one standard free speech value on both sides of the question: whom to recognize first?

It is useless to deny that if the speakers at this civic meeting are seeking to address some civic issue, the "democratic governance" free speech value[129] is at least to some degree implicated. It is also impossible to deny that the free speech value centering on the search for political or other forms of truth[130] is implicated at least minimally as well. Further, it is entirely possible, based on mainstream understandings, that the self-realization free speech value[131] is also implicated.

Although the hypothetical scenario offers little guidance, it may be that one or more of these free speech values is more strongly implicated for one speaker than for another. Yet all of the free speech values are at least minimally implicated on both sides. Even if this almost unsimplifiable scenario involves all, and not just one, of the standard free speech values on both sides, it is easy to imagine cases where this is even more complicatedly so.[132] For example, another hypothetical may be a racial harassment case in which both the speaker and the alleged victim assert, to one degree or another, whether plausibly or not, each of the free speech values of the search for truth; the democratic governance process; and, crucially, one or more versions of the idea of self-realization, autonomy, or self-fulfilment.[133]

It is fair to say that even relatively simple free speech cases may be surprisingly complex. On the other hand, the fact that free speech values will be crucial to both sides' case should be taken advantage of, particularly where they are substantively quite similar free speech values.[134] Free speech cases

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rubrics of, say, equal protection or even procedural due process. However, it is hard to see how these approaches would allow for really substantive bypassing the consideration of all the free speech issues.

129. *See supra* note 14 and accompanying text.

130. *See supra* note 13 and accompanying text.

131. *See supra* notes 15-16 and accompanying text.

132. Consider the racial harassment speech case of *Aguilar v. Avis Rent A Car System*, 980 P.2d 846 (Cal. 1999), *cert. denied*, 120 S. Ct. 2029 (2000) (Thomas, J., dissenting from denial of certiorari), discussed in greater detail *infra*.

133. Consider this possibility in the context of *Aguilar*, and as elaborated in discussions such as those contained in, e.g., RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997); THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (Laura J. Ledérer & Richard Delgado eds. 1995).

134. Admittedly, there is a strong sense of "sameness" in which precisely the "same" free speech value cannot appear, either self-cancelling or self-negating, on both sides of the case. *See* Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1217 (1998). For the sake of having a term, simply say that the free speech values on both sides of a case are "homologous" when they are, in a looser or more generic sense, the "same" free speech values. Also remember the important complication that even qualitatively similar free speech values may deserve dramatically different "weights," or come in different "magnitudes."

need not invariably inspire a sense of arbitrariness, hopelessness, or pointlessness in attempting to exercise rational judgment. It is difficult to believe that cases in which there are generally the same free speech values on both sides of the case allow only a purely subjective, deeply arbitrary resolution.

B. The Limits of Incommensurability as a Problem

To paraphrase Justice Scalia, the paradigm of a difficult, incommensurate case asks whether a particular line is as long as a particular rock is heavy.[135] As long as observers ignore context, interest, and purpose, reasonably comparing line lengths and rock weights may seem impossible.

People lack what is referred to as a common metric in such cases. We cannot tell whether a two foot line is long until we know whether we are wrapping jewelry boxes or rescuing drowning swimmers. Nor can we tell whether a three pound rock is heavy until we know whether it is to be a paperweight or ammunition against an enemy ship. Comparing a two foot line and a three pound rock, in the abstract, seems arbitrary because of the lack of a common metric or a common scale. But this matters less than is commonly imagined.

Comparing out of context or deciding legal cases apart from context, interest, and purpose is not necessary. In fact, it can be reasonably said, for example, that a meteor that is about to collide with and destroy the earth is bigger as a rock than a typical one angstrom[136] unit line is long in length. However surprising or unpopular it may be to say so, reasonable decision-making, legal or otherwise, does not require a common metric.

Actually, anyone who has even inconclusively debated the relative worthiness of sports figures knows that though there is much subjectivity and rational indeterminacy in such comparisons, incommensurability need not always pose decisive practical problems. A standard view of incommensurability may be worked with, when some given value is neither greater than, less than, or equal to another value.[137]

As much as people might fruitlessly argue about the best or most valuable twentieth century baseball pitcher, for example, we still can reasonably pronounce Lou Gehrig a better first baseman than Joe Pepitone. It is also

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135. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

136. If necessary to save the example, the length of the line could be taken down to Planck territory.

137. *See, e.g.*, Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995). Warner then goes on to attempt to draw a tenable distinction between comparing reasons and excluding reasons in making a decision. *Id.* at 1717; *see also, e.g.*, Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 805 (1994) (citing the work of Joseph Raz).

quite reasonable to say that Gehrig was a better first baseman than Tom Tresh was a center fielder. Or that Gehrig was a better first baseman than Joe Don Looney was a pro running back. Differences in position, historical period, or even of sport either do not necessarily create real incommensurabilities, or the incommensurabilities do not necessarily affect our ability to make reasonable comparative evaluations. To deny any of the above comparative evaluations is merely to expose one's own evaluative arbitrariness, and not that of the comparisons themselves.

It can make sense, in an appropriate case, to say that it is reasonable to conclude that Lou Gehrig was better as a first baseman than a clay ashtray is as a work of art, or greater than a one angstrom unit line is in length.[138] Reasonably comparing free speech interests should not be given up based on a fear of incommensurability. Reasonable, not entirely arbitrary, comparative evaluations can often be made, despite the lack of commensurable units on the two sides.

C. An Example of Progress: Injunctive Remedies for Racist Speech

To see how some of these possibilities, as well as the inescapable limitations, play out in the arena of conflicting free speech interests, the difficult and challenging offensive speech case of *Avis Rent A Car System v. Aguilar* shall be considered briefly.[139] The trial court found that Lawrence, an Avis employee at the San Francisco airport facility, had routinely verbally harassed several Latino drivers on the basis of race or ethnicity.[140] The plaintiff Latino drivers obtained injunctive relief barring Lawrence from the workplace utterance of a judicially composed list of words likely to be offensive to Latinos, whether within the hearing of any Latinos or not.[141]

This case divided the California Supreme Court on several grounds,[142] but this Article's focus shall be exclusively on Justice Thomas's concern[143] that granting the injunction undervalues the Court's well-established "prior

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138. One way of going about this comparison would be to say that this one angstrom unit length line is not one of the longer lines ever encountered in ordinary cultural activities, whereas Lou Gehrig was one of the best first basemen thus encountered. To deny either proposition is more a matter of impeaching one's own judgment or experience than of effectively debunking common sense. Professor Sunstein is willing to consider the possibility of rationally comparing incommensurate musical composers. *See* Sunstein, *supra* note 137, at 800-01. However, reasonable evaluative comparisons can clearly be extended beyond members bearing a common description.

139. 120 S. Ct. 2029 (2000) (Thomas, J., dissenting from denial of certiorari).

140. *See id.* at 2030 (Thomas, J., dissenting from denial of certiorari).

141. *See id.* (Thomas, J., dissenting from denial of certiorari).

142. *See* Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999).

143. *See Aguilar*, 120 S. Ct. at 2029-30 (Thomas, J., dissenting from denial of certiorari).

restraint" doctrine.[144] Enlightenment will be sought by identifying and comparing the standard free speech interests on both sides of the case.

The basic logic of Justice Thomas's position was that injunctions against future speech count as "prior restraints" and are thus heavily disfavored with a strong legal presumption against their validity.[145] Justice Thomas argued that "[w]e have . . . evaluated injunctions against speech as prior restraints, which entails the strictest scrutiny known to our First Amendment jurisprudence."[146] This argument was made against the backdrop of his contention that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[147]

The alternative to injunctive relief, generally and in this sort of hate speech case in particular, would presumably be after-the-fact money damages for any prohibited conduct.[148] So the question is left whether, of the circumstances under which injunctive relief could be judicially preferred to money damages, the injunctive relief is called a prior restraint on speech or not.[149] The focus, in particular, need not be on the seriousness of the speaker's presumed contribution to ongoing public debate.[150] Instead, the focus is on a specific free speech value, that of self-realization, or developmental autonomy, as that value appears on the side of the victimized nonspeaking plaintiffs in the case. By choosing between money damages or injunctive relief, as traditionally disfavored as the latter may be, the free speech value of self-realization on the non-speakers' side of the case may be decisive.

In fact, the non-speakers' self-realizational free speech value offers the best understanding of why the commonly disfavored remedy of injunctive relief could reasonably be chosen in this case. For many reasons, it is difficult to put an approximate dollar figure on the negative value of the infliction of demeaning racial epithets. Even one such incident may, in subtle but important ways, impair the victim's quality of social and political life.[151]

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144. *See* Near v. Minnesota, 283 U.S. 697 (1931) (establishing a classic example).

145. *See Aguilar*, 120 S. Ct. at 2029-31 (Thomas, J., dissenting from denial of certiorari).

146. *See id.* at 2031 (Thomas, J., dissenting from denial of certiorari) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (citation omitted)).

147. *Id.* at 2029 (Thomas, J., dissenting from denial of certiorari) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

148. *Id.* at 2032 (Thomas, J., dissenting from denial of certiorari).

149. Certainly the alleged prior restraint here would be somewhat less than the classical licensing scheme; the idea would instead be that whatever ideas the speaker wishes to communicate, those ideas, popular or unpopular, must be communicated without recourse to specified ethnic slurs. For background, see *FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.").

150. *See supra* note 149.

151. For discussion, see, e.g., Richard Delgado, *Are Hate-Speech Rules Constitutional*

It is also easy to imagine that it is the aggregate or cumulation of such occurrences, as opposed to any single incident, that takes the major toll.[152] Persons may differ in the sheer pain experienced in such cases. Eventually, some, but not all, may develop something of a protective carapace that is itself a cost or harm to the target of epithet speech.

To attempt to put a compensatory dollar figure on the possible forms of inhibition, withdrawal, anger, alienation, distraction, self-censorship, and other reactions to such ethnic slurs is an exercise as much in arrogance as in irresponsible speculation. If, on the other hand, the court follows the prior restraint model[153] in the sense of threatening judicial sanctions genuinely sufficient to deter the specified misconduct and known to be sufficient by the victims such that the need for constant defensive vigilance can be partially relaxed, the victims' self-realization potentials[154] are left as nearly unimpaired as the circumstances permit.

It is possible both that a somehow predictable money damages remedy could be a sure deterrent and that a prior restraint "remedy" might be insufficient and known in advance by the victims to be insufficient. In just these cases, it would be impossible to say that the prior restraint "remedy" respects the victims' self-realization free speech values better than an after-the-fact damages action.

There remains something about the prior restraint approach that suggests its superiority in general. The prior restraint approach in an obvious sense "prefers" that the impairment of victims' self-realization values simply not occur. To the extent that this approach is, and is foreseen to be, successful, the courts need not grapple hopelessly with the imponderables involved in the damages, or strictly remedial, approach in which a jury of whatever life experiences is invited to guess how much money would fully compensate for the loss of quite real but almost utterly ungraspable qualities of self-realization.

The attraction of a "prior restraint" approach should be viewed in more concrete terms. Someone may be indifferent as between suffering a broken ankle with a later $10,000 damages award and having neither the broken ankle nor the money damages.[155] However, there should be more suspicion of the idea of trading some of one's own genuine self-realization; one's own real

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Heresy? A Reply to Steven Gey, 146 U. PA. L. REV. 865 (1998). For a remarkable and quite instructive first-hand account, see Wojciech Sadurski, *Offending With Impunity*, 14 SYDNEY L. REV. 163 (1992).

152. Each separate instance may be painful, but only the cumulation may drive the victim to seek some sort of medical or psychological relief typical of traditional tort recovery paradigms. And only the cumulation of slurs, insults, and affronts may have the kind of deep, irreparable damage feared by the Court in *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

153. Near v. Minnesota, 283 U.S. 697 (1931).

154. *See supra* notes 15-16 and accompanying text.

155. For general background, see, e.g., CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 560 (1935).

flourishing, maturing, and developing as a person, in exchange for some amount of money—assuming the money payment does not go precisely to restoring the lost (capacity for) self-realization.

There is a sense in which it is at least controversial to trade genuine self-realization, as John Stuart Mill describes it,[156] for money if the money does not itself promote self-realization. If someone seems to disagree with the sentiment Mill expressed, that it is "better to be Socrates dissatisfied than a [pig] satisfied,"[157] at least that person can be asked to reconsider whether real losses in self-realization, overall, can be worth a gain in money that does not contribute to self-realization. Mill's result should not change even if the pig is quite rich. Trading away genuine self-realization for money thus may be unlike reasonably trading, say, some of one's salad for more dessert, or vice versa.

It seems fair to conclude that a clear and deep answer can be offered to Justice Thomas's concerns over recourse to a prior restraint on speech in the *Aguilar* case. The answer focuses on a standard free speech value underlying not only[158] the speaker's side of the case, but the victims' side of the case as well. In particular, the free speech value of self-realization tends, despite undoubted complications, to commend a prior restraint as opposed to damages-oriented judicial response in this kind of case.

VI. CONCLUSION

Recognizing the exhaustiveness of the free speech values on both sides of free speech cases offers a greater legal understanding and sometimes a more defensible judicial result. But this approach does not convert hard cases into easy cases. Even the same general free speech value on both sides of the case might not amount to the same, or even different amounts of precisely one "common currency."[159] The context and circumstances of the speaker and of other affected persons might vary dramatically. One might also conceivably argue that one free speech value—say that of democratic political governance—always trumps the value of self-realization (insofar as the latter can be separated from the former). This would amount to a narrowly political view of free speech. Also one could argue, conceivably, that some particular free speech value in one particular context always outranks the same free

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156. *See* MILL, *supra* note 13, at 97.

157. *See* JOHN STUART MILL, *Utilitarianism*, *in* ON LIBERTY, REPRESENTATIVE GOVERNMENT, UTILITARIANISM 9 (1910).

158. One suspects that Mill might not have believed that the gratuitous, repeated use of ethnic slurs, directed essentially at a captive audience, promotes even the speaker's genuine self-realization, but other views of the nature of self-realization may, whatever their ultimate relative merit, be less demanding.

159. *See* Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 785 (1994).

speech value in another context. Thus, one might argue that even minimal self-realization by outcast groups trumps heightened self-realization by elite, dominant groups. Therefore, these kinds of cases may be claimed to be relatively easy.

Often, though, there will remain the need for intelligent judgment, wisdom, empathy, self-restraint, and concentrated study in resolving even structurally simple free speech cases. Suppose that *Aguilar* were reducible to the self-realization of the epithet-hurler against the self-realization of the epithet targets. Such a case would be reasonably resolvable, but not in a merely mechanical way.[160] At least some minimal application of the intellectual and emotional virtues above[161] would still be required.

However, our main thesis has the virtue of calling attention to the free speech interests of the targets of hate speech and in particular to their free speech value of self-realization. This is important not only for understanding the constitutional position of hate speech victims, but for legitimately advancing their interests as well. Too often, the debate over hate speech regulation is wrongly thought to boil down to the relative priorities of equality on the one hand and constitutionally protected freedom of speech on the other.[162]

This sort of presumed conflict grossly distorts the real value conflicts at stake in much hate speech litigation. As long as typical hate speech regulation is understood as a battle between[163] equality and freedom of speech, the judicial culture's typical quasi-religious devotion to free speech will disadvantage hate speech victims.

Once the self-realizational interests at stake, particularly on the side of the victims of hate speech, are fully appreciated, no longer in good conscience can hate speech regulation be seen as merely some vision of equality versus freedom of speech, where the hate speakers hold all the free speech cards. Instead, there would then be more recognition of the powerful free speech value interests underlying the case for the victims of such hate speech.

More generally, seeing free speech cases as ultimately reducible to contests of the standard free speech values, as standardly formulated, allows for all such progress in reasonably resolving free speech cases as an improved understanding of the real nature of free speech cases can promote.

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160. To further move the argument along, it may be assumed that even the bare utterance of a racial epithet by itself constitutes an expression of some social idea sufficient to merit inclusion within the scope of "speech" for constitutional purposes.

161. For the uses, if not the indispensability, of the virtues, see, e.g., ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999); MICHAEL SLOTE, GOODS AND VIRTUES (1983). For a distinctly traditionalist vein, see ST. THOMAS AQUINAS, TREATISE ON THE VIRTUES (John A. Oesterle trans. 1966).

162. *See, e.g.*, Steven G. Gey, *The Case Against Postmodernist Censorship Theory*, 145 U. PA. L. REV. 193, 194-95 (1996).

163. *See, e.g.*, Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. Rev. 203, 213-14 (1994).